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No. 743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SOUTHERN PILOTS ASSOCIATION, ET AL., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

and

AIR LINE PILOTS ASSOCIATION, *Intervenor*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERVENOR AIR LINES PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

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BRIEF OF INTERVENOR AIR LINES PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

This brief is submitted to the Court by the Air Line Pilots Association, International (hereinafter called "ALPA"), the complainant in the administrative proceeding before the Civil Aeronautics Board from which this proceedings arises, and an intervenor in the case before the Court of Appeals.

OPINIONS BELOW

The opinion of the court below (App. B of Petition) is reported at 323 F. 2d 288. The orders of the Civil Aeronautics Board of which petitioners complain are not yet officially reported. They appear at pages 101, 206, and 223 of the printed joint appendix before the Court of Appeals.

JURISDICTION

The petition correctly states that the judgment of the Court of Appeals was entered on June 13, 1963, and that a petition for rehearing *en banc* was denied on October 14, 1963. However, the petition omits to mention that a petition for rehearing, filed by petitioners in accordance with Rule 26 of the Rules of the Court of Appeals, was denied by that Court on July 8, 1963 (Appendix A hereto), and that the petition for rehearing *en banc* which was denied on October 14, 1963, was an untimely filed second petition for rehearing.[1] The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1) and 49 U.S.C., 1486(f).

[1] It is doubtful whether the petition for a writ of certiorari was timely filed pursuant to 28 U.S.C., Section 2101 (c), and Rule 21, paragraph 3 of the Rules of this Court. The 90-day period for filing the petition was commenced upon the Court of Appeals denial of petitioners' petition for rehearing on July 8, 1963 (Appendix A hereto). The motion for rehearing *en banc* was mailed to the Court of Appeals on July 5, 1963, and was rejected by the Clerk of the Court as untimely on July 8, 1963. Thereafter, on July 10, 1963, petitioners filed a motion for leave to file a motion for argument before the Court *en banc*, which was granted on July 16, 1963. The petition for rehearing *en banc* was filed on July 30, 1963, and was denied on October 14, 1963. Under these circumstances, it is doubtful that the second petition for rehearing *en banc* operated to extend the 90-day period for the filing of a petition for a writ of certiorari in this Court. Cf. *Gunsy Oil Company v. Bennett*, 275 U.S. 498. See *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206.

QUESTION PRESENTED

The single question presented to this Court is:

1. Did the Court of Appeals err when it dismissed the petition to review the orders of the Civil Aeronautics Board complained of by petitioners, where

(a) the Board's orders directed Southern Airways to bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the Board's attached opinion; and

(b) petitioners did not seek to participate in the Board proceeding, although they had notice of the proceeding pending before the Board at least nine months prior to the issuance of the Board's order, and they raised no complaint concerning the Board's order until nearly four months after the order was issued, at a time when Southern and ALPA had reached agreement and stability of labor relations had been restored on that carrier.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations involved are either quoted in Appendix A to the petition or in Appendix B to this brief.

STATEMENT

The administrative proceeding before the Civil Aeronautics Board, which resulted in the issuance of the Board orders complained of, arose from violations by Southern Airways of its obligations under the Railway Labor Act. The Civil Aeronautics Board undertook to enforce the performance of these obligations by Southern pursuant to its authority under Section 401 (k)(4) of the Federal Aviation Act of 1958.

On July 30, 1959, ALPA, the duly certified representative under the Railway Labor Act of Southern pilots and copilots, served a notice upon Southern in accordance with the requirements of Section 6 of the Railway Labor Act (45 U.S.C.A., Section 156) proposing certain changes in the collective bargaining agreement between the parties (R. 63).[2] When subsequent negotiations between the parties, including mediation by the National Mediation Board, produced an impasse, the National Mediation Board proffered arbitration. ALPA accepted this proffer of arbitration, but Southern rejected it. (R. 65, 66.) ALPA made a final effort to avoid a strike by advising Southern that it would submit the dispute for settlement to any kind of procedure—fact finding, arbitration, or anything else—for decision or recommendation. This offer was also rejected by the carrier. (R. 32.)

The carrier's refusal to arbitrate exhausted the procedures of the Railway Labor Act for settlement of the dispute. No procedure for resolving the impasse between the parties remained, and the pilots withdrew from the service of the carrier on June 5, 1960. (R. 24.)[3]

On July 11 and 12, 1960, the parties renewed negotiations under the auspices of the National Mediation Board. (R. 24.) While these meetings resulted in a resolution of all open economic issues between the

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[2] Reference is to pages of the printed Joint Appendix before the Court of Appeals, nine copies of which have been filed with this Court.

[3] A Presidential Emergency fact finding Board, authorized by Section 10 of the Railway Labor Act (45 U.S.C.A., Section 160), was not appointed in the dispute.

parties, no contract was consummated since Southern interposed new conditions of reaching agreement with ALPA. It insisted that (1) the striking pilots forfeit their accumulated seniority and begin accumulating new seniority only from the date on which they returned to work; and (2) ALPA give Southern the right to take unilateral and unreviewable disciplinary action, including discharge, with respect to any pilot who, in Southern's view, had engaged in misconduct during the strike. (R. 67.)

Further negotiations began on July 27, 1960. In these meetings Board Member Edwards proposed a settlement of all issues between the parties raised by ALPA's notice and proposals of July 30, 1959. (R. 68, 69.) ALPA accepted Mr. Edwards' proposals on July 28, 1960. (R. 69.) Under the same date, Southern sent a letter to Mr. Edwards, which read in pertinent part as follows: (R. 70)

> "Please be advised that Southern Airways, Inc. accepts in principle your award, subject to execution of an agreement disposing of all issues between Southern and ALPA, except insofar as it pertains to duration. Southern's position is that the contract should continue in effect for two years from the date of execution.
>
> "Southern's acceptance of your advisory award is made without prejudice to its position concerning the following matters:
>
> (1) *Seniority*—Nearly 100 pilots have been employed since the strike began, and we require only about 40 additional pilots. We are willing to return to service as many of the strikers as our needs dictate, *but their seniority will date from the date on which they return to work.* (Emphasis supplied.)

(2) *Disciplinary Action*—Southern reserves the right to take disciplinary action, including ineligibility to return to service, in the case of pilots who have engaged in misconduct during the strike.

(3) *Parking Aircraft*—Any agreement finally executed would have to provide for pilots' parking and moving aircraft."

Thus, the only aspect of Mr. Edwards' proposal which was not fully resolved as of July 28, 1960 was the duration of the proposed agreement, i.e. whether it would be 18 months from July 1, 1960, or two years from the date of execution. The issues relating to duration of the agreement and the parking of aircraft (the latter not previously raised in negotiations) were relatively minor items, which, had they been raised independently by Southern and not as part of that carrier's seniority and discipline proposals, would not have produced an impasse in negotiations.

ALPA rejected the conditions imposed by Southern for settlement on the grounds that they were improper and illegal. (R. 41.)

On July 22, 1960, ALPA filed a complaint with the Civil Aeronautics Board pursuant to the provisions of Section 302.201 of the Board's rules of practice applicable to economic enforcement proceedings (Part 302 of the Board's Economic Regulations, 17 F. R. 3029, et seq., as amended; 25 F. R. 8054; 27 F. R. 12545). This complaint set forth the dispute between ALPA and Southern and alleged that Southern had violated and was continuing to violate the terms and conditions of its certificate, the provisions of the Federal Aviation Act, and the provisions of the Railway Labor Act in its conduct with respect to its dispute

with its pilots. The complaint requested the Board to direct Southern to comply with the provisions of the two statutes and, in the event of that carrier's failure to do so, to suspend or revoke all certificates authorizing Southern to engage in air transportation which had theretofore been issued to that carrier by the Board. (R. 6-12.)

After Southern filed an answer to ALPA's complaint (R. 13) and ALPA filed a reply (R. 14), the Director of the Board's Bureau of Enforcement on September 26, 1960, docketed a "Petition for Enforcement", which recited that "there are reasonable grounds to believe that certain provisions of the Federal Aviation Act of 1958, as amended, and requirements thereunder have been violated by Southern Airways, Inc., as alleged in the Complaint filed by the Air Line Pilots Association * * *." (R. 15.)

The proceeding thus instituted by the docketing of the petition for enforcement was publicly noticed for hearing to begin on November 15, 1960 (R. 16), through a notice signed by the Chief Examiner of the Board, dated October 25, 1960, and published in the Federal Register on October 28, 1960 (Vol. 25, page 10372). Subsequently, on November 8, 1960, a notice was issued by the Chief Examiner and filed in the Federal Register for that date (Vol. 25, page 10667) postponing the hearing in the proceeding from November 15, 1960, to December 1, 1960. (R. 17.)

Sections 302.10 and 302.15 of the Board's rules (Appendix B, p. 27) permitted intervention in the proceeding by (1) any person who had a statutory right to be made a party, and (2) any person whose intervention would be conducive to the ends of justice and would not

unduly impede the conduct of the Board's business. Rule 15 requires the filing of a petition to intervene within 15 days prior to the hearing. A petition to intervene which is not filed within the designated period may be entertained and granted by the Board upon a showing of good cause for the failure to make a timely filing. The petitioners did not file a petition to intervene in the proceeding prior to the beginning of the hearing therein.

The hearing in the proceeding began on December 1, 1960, and ended January 18, 1961. (R. 18, 62.) None of the petitioners appeared at the hearing or made any effort to intervene in the proceeding during this period. The parties appearing and participating in the hearing were ALPA, Southern Airways, and the Board's Bureau of Enforcement.

On September 23, 1961, the Hearing Examiner issued his Initial Decision. This decision concluded (a) that the Board had jurisdiction to determine the issues raised by the pleadings; (b) that the evidence of record failed to sustain the allegations of the complaint filed by ALPA; and (c) that the complaint should be dismissed. (R. 81-88.) This Initial Decision was given publicity in the newspapers and petitioners were aware of its issuance. (R. 214.) However, none of the petitioners made any effort at the time to intervene in the proceedings or to take any other action with respect thereto.

On October 9, 1961, ALPA filed exceptions with the Board to the Initial Decision. (R. 89.) The issues were orally argued before the Board on November 30, 1961. (R. 97.)

On May 25, 1962, the Board issued a press release announcing that it had reached a tentative decision in the proceeding. (R. 97.) This press release spelled out the Board's conclusions and stated that they would be embodied in a formal decision to be issued at a later date. Petitioners concede that they were aware of this press release at the time it was issued and the fact that their job rights were being considered in the Board proceeding. (R. 215.) Yet petitioners made no effort to intervene in the Board proceeding or to take any other action to protect their rights although a period of six weeks elapsed between the issuance of the press release and the serving of the formal Board opinion and order finalizing the tentative decision announced in the press release.

The Board order (No. E-18560) was dated July 5, 1962, and served on July 6, 1962. (R. 155.) In the opinion accompanying the order, the Board found as follows: (R. 133)

> "1. That, pursuant to the powers vested in its by Sections 204(a), 401(g), 401(k), and 1002(a), and (c) of the Federal Aviation Act of 1958, as amended, the Civil Aeronautics Board has jurisdiction to hear and determine the complaint filed by ALPA in this proceeding alleging violations of the Railway Labor Act and the Federal Aviation Act by Southern;
>
> "2. That Southern at all times from the inception of the negotiations on the new labor contract in July 1959, up to July 12, 1960, bargained in good faith with ALPA in compliance with Section 2, First, of the Railway Labor Act, as amended;
>
> "3. That on July 12, 1960, Southern and ALPA reached an impasse in their negotiations on request by ALPA and counter demands by Southern

with respect to (1) the reinstatement and seniority of the strikers in relation to the replacement employees, and (2) disciplinary action against striking employees;

"4. That Southern's demand relating to job retention and seniority is unlawful because it entails unreasonable and undue discrimination against the striking employees;

"5. That Southern's demand relating to non-reviewable disciplinary action is illegal *per se* because it would deprive employees of their statutory rights to have their grievances adjusted in accordance with procedures established pursuant to Section 204 of the Railway Labor Act and constitutes improper coercion and an unwarranted interference with protected rights of employees;

"6. That the continued insistence by Southern on its aforesaid demands as a condition for settlement of the strike and agreement on a new labor contract would constitute a failure by Southern to bargain in good faith with ALPA as required by Section 2, First of the Railway Labor Act;

"7. That Southern should be ordered to comply forthwith with its obligations under the Railway Labor Act to bargain in good faith with ALPA, and compliance with such order should be achieved by Southern within a period of thirty (30) days after issuance thereof, failing which, Southern's authority to engage in air transportation would be subject to suspension or revocation pursuant to Section 401(g) of the Federal Aviation Act;

"8. That Southern will not achieve compliance with such Board order unless in the settlement of the dispute and agreement on a new labor contract with ALPA it is guided by the principles set out above in our opinion;

"9. That should ALPA not observe the principles set out above or otherwise not cooperate

with Southern in the settlement of the dispute and agreement on a new labor contract, this be taken into account in considering any further action by the Board in this proceeding;

"10. That ALPA's contention that Southern has failed to comply with certain mandatory procedures of the Railway Labor Act with respect to the matters of seniority and discipline; be rejected; and

"11. That the various exceptions and other contentions of the parties, except to the extent indicated above, do not require any change in our findings and conclusions reached herein."

The Board's order contained the following directive: (R. 155)

"It Is Ordered That:

"1. Southern Airways, Inc., shall within thirty (30) days after issuance of this order bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the attached opinion;

"2. The Board retains jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern Airways, Inc., with this order."

Section 302.37 of the Board's rules (Appendix B p. 28) provides that any party to a proceeding may file a petition for reconsideration, rehearing, or re-argument of a final order issued by the Board within 20 days after service thereof. No petition for reconsideration of the Board's order of July 5, 1962, was filed with the Board.

On August 14, 1962, Southern Airways filed a document with the Board entitled "Petition for Directive

By Southern Airways, Inc." (R. 201.) This document recited that Southern Airways was in the process of complying with Board order No. E-18560, subject to judicial review of such order. Southern requested the Board to clarify its opinion and order in certain respects. On August 27, 1962, the Board issued Order No. E-18737. (R. 206.) That order provided the clarification requested by Southern, and concluded in its directory portion, (R. 210), that "Southern be guided in its future negotiations with ALPA, pursuant to Order E-18560, adopted July 5, 1962, by the determination stated above."

On September 21, 1962, ALPA and Southern Airways signed a memorandum agreement identified as a "Back to Work Agreement". (R. 219.) Section 2 of the agreement upon which petitioners' claims are focused, provides for the application of the principle of seniority based on date of hire uniformly to all pilots covered by the agreement, including both striking and replacement pilots. (R. 221.) By this time more than three months had elapsed since the Board had announced its proposed decision in this matter, by means of a press release of May 25, 1962, of which petitioners had actual notice. They had yet taken no action before the Board to assert any interest in this matter.

On October 26, 1962, the petitioners filed their petition in the Court of Appeals to review Board Orders No. E-18560, dated July 5, 1962, and No. E-18737, dated August 27, 1962, without previously raising any objection to or asserting any interest in those orders before the Board. Approximately five months had elapsed since May 25, 1962, the date of the press re-

leave by which, as petitioners concede, they first became aware of the Board's action.

Finally, on October 29, 1962, petitioners filed with the Board a petition (1) for leave to intervene in the proceeding in Docket No. 11654; (2) for a rehearing in such proceeding; (3) for reconsideration of Board Orders No. E-18560 and No. E-18737; and (4) for a suspension of such orders. (R. 211.)

That petition was dismissed by Board Order No. E-19162, dated January 3, 1963. (R. 224-227.) The Board, in its order of dismissal, noted that the petition was untimely and need not be entertained, but it nonetheless accepted the petition for filing and considered it on its merits. The order found that Southern and ALPA had resumed negotiations and concluded an agreement on September 21, 1962, thus finally resolving their dispute, and that there was no showing of a lack of good faith bargaining in these negotiations. Upon petitioners' motion, Order No. E-19162 was added to the subject matter of the petition for review, by order of the Court of Appeals dated February 7, 1963. (R. 5).

On November 13, 1962, petitioners filed a motion with the Court of Appeals for an order staying Board orders No. E-18560 and No. E-18737 and staying the effectiveness of the agreement of September 21, 1962, between ALPA and Southern Airways. That motion was denied by the *per curiam* order of the Court of Appeals of November 21, 1962.

Similar applications for stays by petitioners were denied by the United States District Court for the Northern District of Georgia in the case of *Holman, et al.* v. *Southern Airways and Air Line Pilots Associ-*

ation, 210 F. Supp. 407 (1962) (an action in which petitioners unsuccessfully sought to enjoin the implementation of the Back to Work agreement) and by the Court of Appeals for the Fifth Circuit on appeal from the decision in the *Holman* action while the petition for review before the Court of Appeals in the District of Columbia was pending.

On June 13, 1963, the Court of Appeals issued the order now sought to be reviewed, dismissing the petition for review. (App. B to Petition, 34.)

ARGUMENT

The Court below dismissed the petition for review on the ground that a decision by the Court on the validity of the Board orders "would have no effect because the rights and duties of the parties are now controlled by the bargaining agreement subsequently entered into." (App. B to Petition, 37.) This statement has reference to the Back to Work agreement of September 21, 1962 between ALPA and Southern, thereafter fully implemented, which finally resolved their dispute.

None of the arguments set forth in the petition warrant a review of this matter by the Supreme Court. The decision of the Court of Appeals is not in conflict with any decisions of this Court or of any other Court of Appeals, nor does the petition raise an important or substantial Federal question. The Court of Appeals did not err, nor was a duty to petitioners violated by the consummation by Southern and ALPA of an agreement providing that the seniority of pilots shall be determined by their date of hire.

I. The decision below does not conflict with previous decisions of this Court

The petitioners argue at pages 7-8 of the petition that the decision below conflicts with previous decisions of this Court.

A material distinction between such decisions and the decree now sought to be reviewed has been overlooked by petitioners. The decisions to which they have referred at pages 7-9 of the petition held that the continuing effects of antecedent unfair labor practices should not go unremedied, notwithstanding the passage of time and the events which intervened since those practices occurred. In contrast, petitioners here argue that a remedy provided by the Board, and fully adopted and implemented by the parties, should be vacated notwithstanding the passage of time and events which intervened since the unfair labor practices occurred. The decisions upon which they rely directed that specified affirmative action be taken. The relief sought by petitioners is a direction that specified administrative orders, which, because they have been complied with no longer control the rights and duties of the parties to which they are addressed, be vacated. Under such circumstances, modification of the orders of the Board would leave the parties to the collective bargaining agreement unaffected. The validity of the collective bargaining agreement between the parties is not challenged in these proceedings nor could it properly be challenged herein.

2. The decision of the Court of Appeals does not conflict with decisions of other circuits

The petitioners contend at pages 8 and 9 of their petition that the decision below conflicts with decisions of other circuits. In each of the decisions cited by petitioners in support of this proposition, the National Labor Relations Board sought judicial enforcement of a remedy for the continuing effects of antecedent unfair labor practices though such practices were no longer continuing to occur. As discussed above, such decisions are not relevant, since there has been full compliance with the Board's remedial orders, and the petitioner, unlike the National Labor Relations Board in the decisions referred to, is aggrieved solely by a collective agreement which is not dependent upon the Board's orders for its validity.

3. The petition does not present an important Federal question

Petitioners assert at page 9 that an important Federal question is presented because the Civil Aeronautics Board has issued orders dealing with a labor dispute. Petitioners did not avail themselves of the opportunity to raise that issue before the Board, nor was it passed upon in the decision of the Court of Appeals sought to be reviewed. Aside from its substantive lack of merit, such an issue should not be used to obscure the single reason for petitioners' attack upon the Board's orders—their dissatisfaction with that portion of the agreement between Southern and ALPA providing that seniority of pilots shall be based upon date of hire. Petitioners would have this Court set aside a remedy provided for serious unfair labor practices, grant them preferred seniority positions unwarranted by their hiring dates, and restore the unrest

which once prevailed at the expense of the labor relations stability which has now been achieved between Southern and its employees. Such a claim raises no substantial federal question.

4. The Court of Appeals did not err

The decision of the Court of Appeals which petitioners now seek to review in this Court is not inconsistent with the decision reached by the United States District Court for the Northern District of Georgia in *Helman* v. *Southern Airways, Inc.*, 210 F. Supp. 407, an action brought by petitioners. There, in a collateral proceeding, petitioners sought to attack the validity of orders of the Board of which they here complain, and by such an attack, to set aside the current collective bargaining agreement between Southern and ALPA. They have failed to recognize that the validity of that agreement is to be tested not upon a review of the Board's orders, but rather by a separate and independent examination of rights and obligations created by the Railway Labor Act. Nor is the action below inconsistent with the determination of the United States District Court for the Middle District of Tennessee in *ALPA* v. *Southern Airways, Inc.*, 49 LRRM 3145 (1962) (not otherwise reported). There, *inter alia*, injunctive relief was granted to ALPA against Southern Airways restraining that carrier from insisting, as a condition of reaching an agreement with ALPA, upon the unreviewable and unilateral right to discipline striking employees. (R. 108, footnote 2; R. 110, 114, 121-123)

The petitioners have failed to raise a timely objection to the Board's orders, and events have not stood still. They now complain that they have been unable to reach the agreement between Southern and ALPA

in proceedings seeking review of the Board's orders. Despite their actual notice of proceedings before the Board at least as early as September 23, 1961, and their actual notice of the Board's proposed decision on May 25, 1962, they made no move until October 29, 1962, some five weeks after ALPA and Southern had consummated and proceeded to implement an agreement ending their dispute, before raising their grievance for the first time in any form.[6]

5. The Board orders sought to be reviewed are valid and proper

a. *The Board possessed jurisdiction to issue the orders in question.* Petitioners' contentions to the contrary are without merit. Plain and unambiguous language of Section 401(k)(4) of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1371(k)(4)) specifically requires air carriers, as a condition of the holding of a certificate, to comply with the requirements of the Railway Labor Act. Sections 401(g), 1002(a), (b) and (c) of the same statute (49 U.S.C.A., Section 1371(g) and Sections 1482(a), (b) and (c)) authorize the Board to compel compliance with the provisions of the Act and to revoke an air carrier's certificate for intentional failure to comply with any condition thereof.[7] Legislative history of Section 401(k) shows that it was enacted for the specific purpose of providing effective machinery for the enforcement of the provisions of the Railway Labor Act applicable to air carriers by the agency administering

[6] The contention that the Board lacked jurisdiction was not properly reviewable by the Court of Appeals under Section 1006(e) of the Federal Aviation Act because it was not presented to the Board. It was raised originally by Southern but abandoned when the Hearing Examiner's Initial Decision found jurisdiction

the Civil Aeronautics Act, predecessor statute to the Federal Aviation Act of 1958.[5] Moreover, the Board, under Section 412 of the Federal Aviation Act (49 U.S.C.A., Section 1382), has often passed upon questions relating to the rights and obligations of carriers under the Railway Labor Act. *Airlines Negotiating Conference*, 8 C.A.B. 354 (1947); *Six Carrier Mutual Aid Pact* (Docket No. 9977, decided May 20, 1959).

b. *The effect of the Board orders.* Petitioners argue that the Board orders were invalid because the Board did not have authority to issue guidelines for subsequent collective bargaining between ALPA and Southern. The Board's order of July 5, 1962, simply held, however, that conditions precedent to consummation of an agreement imposed by Southern with respect to seniority and discipline were violative of the Railway Labor Act. Its subsequent order of August 27, 1962, clarified, at Southern's request, the nature of the obligation which the Board's remedial order placed upon that carrier. The Board required Southern to bargain in good faith with ALPA. ALPA and Southern were left free to negotiate a collective bargaining agreement in good faith and consistent with the requirements of the Railway Labor Act. In no sense did the Board prescribe the terms of the ultimate agreement, beyond prohibiting an insistence by the

[5] Hearings on H.R. 5234 before House Committee on Interstate and Foreign Commerce, March and April 1938, pages 202, 213, 370; Hearings on H.R. 9738 before House Committee on Interstate and Foreign Commerce, March and April 1938, pages 10, 213, 215, 237, 238; Hearings on S. 2 before Subcommitte of Senate Committee on Interstate Commerce, March and April 1938, pages 22, 24, 450, 585, 589, 590; Hearings on S. 3659 before Subcommittee of Senate Committee on Interstate Commerce on April 26 and 27, 1938, page 39; House Report No. 2065, 75th Cong., 2d Sess., page 69.

carrier upon contract demands which had theretofore been found to be unlawful.

c. The Board was not required to make petitioners parties to the proceeding before it. Petitioners argue that they were indispensible parties to the proceeding before the Board and the failure of the Board to bring them in as parties invalidates its orders. This objection to the Board orders is not available to petitioners. Section 1006(e) of the Federal Aviation Act (49 U.S.C.A., Section 1486(e)) provides that no objection to the order of the Board shall be considered by the Court unless such objection shall have been urged before the Board, or if not so urged, that there was reasonable ground for failure to do so. Petitioners made no claim of indispensability until October 29, 1962, when they petitioned the Board to reopen the proceedings and permit their intervention almost three months after the Board's order had been issued. There was no reasonable ground for their failure to raise this question at an earlier date; they were admittedly aware of the proceedings before the Board and the issues involved as early as September 23, 1961; and had actual notice of the Board's proposed order not later than May 25, 1962.[6]

The Board's rules provide for intervention in Board proceedings upon the filing of a petition for intervention and a showing of an adequate interest in the proceeding. (*Supra*, p. 7) Petitioners did not seek to

[6]Notices of the hearings before the Board were filed in the Federal Register on October 28, 1960 (Vol. 25, page 10372) and on November 8, 1960 (Vol. 25, page 10667), *supra*, p. 7. The hearing before the Board did not begin until December 1, 1960. Thus petitioners had legal notice of the proceeding under Section 8 of the Federal Register Act (44 U.S.C.A., Section 308—App. B., p. 27).

intervene pursuant to these rules until long after the proceeding had been completed and the Board's orders had become moot.

d. *The Board orders are supported by the record.* The Board found that Southern had violated the statute by demanding, as a condition of agreement, the unilateral and unreviewable right to discipline or discharge strikers. Such a demand was inconsistent with the right of employees to have their grievances adjusted in accordance with the procedures established pursuant to Section 204 of the Railway Labor Act (R. 133). Petitioners contend that this finding is not supported by the record because Southern's position was not inflexible, and that this demand was abandoned by Southern after February 16, 1962. The Board found that such a demand was inflexibly made by Southern, however (R. 69), and there is no evidence that it was ever abandoned. Indeed, it was defended by Southern before the Board as a proper demand, (R. 48.) Under such circumstances, the Board properly held that Southern violated the Railway Labor Act. See *Railroad Trainmen* v. *Georgia Railway*, 305 F. 2d 605 (5th Cir. 1962); *Wilson & Co., Inc.* v. *NLRB*, 120 F. 2d 913 (7th Cir. 1941).

The Board found that Southern violated the Railway Labor Act by demanding as a condition of agreement that the striking pilots forfeit all seniority accrued by them for service in Southern's employ prior to the strike and that their seniority should commence as of the date on which they returned to work. (R. 70.) Such a demand is unlawful *per se*. *Erie Resistor Corp.* v. *NLRB*, 373 U.S. 221 (1963). The Board found that this demand was made to punish the pilots for exercising their lawful right to strike (R. 121).

Petitioners, at pages 20-21, contend that Southern had a legal right to make this demand. Such a contention is contrary to prevailing authority, which has established that it is coercive and a failure to bargain in good faith for an employer to condition any agreement to be reached upon a forfeiture of seniority by strikers and a grant of superseniority to the replacements. *Ballas Egg Products, Inc.* v. *NLRB*, 283 F. 2d 871 (6th Cir., 1960); *Olin Mathieson Chemical Corp.* v. *NLRB*, 232 F. 2d 158 (4th Cir., 1956), aff'd. 352 U.S. 1020 (1957); *Swarco, Inc.* v. *NLRB*, 303 F. 2d 668 (6th Cir., 1962); *NLRB* v. *California Date Growers Association*, 259 F. 2d 587 (9th Cir., 1958); *Stewart Die Casting Corp.* v. *NLRB*, 114 F. 2d 849, 7th Cir., 1940), *enforcing as modified*, 14 NLRB 872, *cert. den.* 312 U.S. 680 (1941).

The recent decision of this Court in *Erie Resistor Case*, *supra*, p. 21, makes it clear that Southern's conduct was illegal *per se*, even in the absence of the Board's finding that Southern's purpose in making such a demand was to punish the striking pilots. Moreover, the Board properly found that it was unnecessary for Southern to promise super-seniority to the replacements in order to enlist them into Southern's employ, and that Southern gave no such assurances to the replacements at the time they were hired. (R. 45, 46, 49-52.)

e. *ALPA did not violate any duty owed petitioners.* Petitioners claim that ALPA did not properly represent them because they are entitled to a priority in job and seniority status notwithstanding Southern's unfair labor practices and bad faith bargaining. This claim was never asserted to the Board until the pro-

ceeding was moot. Moreover, this is nothing more than a claim that Southern should have discriminated in their favor, by granting them superseniority. Understandably, petitioners also claim a right to the assistance of ALPA to achieve such favorable discrimination for them at the expense of the striking pilots, even though such striking pilots would all have returned to work on July 12, 1960, but for the unlawful conduct of the employer.

Petitioners' assertion that ALPA has failed to discharge duties owed them is based simply upon their obvious desire for preferred treatment. However, petitioners do not suggest any legal or equitable justification for an abandonment of the job and seniority rights of the pilots hired prior to June 4, 1960, in favor of the replacement pilots hired on or after that date. Nor do they deny that it was the paramount and enforceable obligation of ALPA to protect the striking pilots against the effect of the company's unlawful conduct.

Petitioners' failure to avail themselves of the liberal procedures for intervention in proceedings before the Civil Aeronautics Board after they had, as they admit, actual notice of such proceedings is not traceable to the violation of any duty owed them by ALPA.

Petitioners condemn the execution between ALPA and Southern of the agreement of September 21, 1962. The provisions of that agreement specifically challenged by petitioners provide for the reinstatement of the striking pilots to their former employment with seniority unimpaired. However, petitioners insist that the returning striking pilots were entitled to something less than reinstatement with seniority unimpaired.

That insistence sharply conflicts with a uniformly accepted body of law and with the orders of the Board which closely follow that body of law. Indeed, had Southern refused to reinstate, with seniority unimpaired, employees whose strike was prolonged by that employer's unfair labor practice, such conduct itself would be discriminatory and illegal. See *Washougal Woolen Mills*, 23 NLRB 1 (1940); *Shenandoah Dives Mining Co.*, 34 NLRB 1153 (1941).

Viewed in proper perspective, petitioners' claim that ALPA has violated a duty owed to them is simply an objection to the uniform application of the principle of seniority to them. Agreements between ALPA and Southern have long contained provisions conferring upon pilots a seniority classification based upon date of hire by Southern. Such seniority classification has always governed the pilots' job rights, including wages, bidding, sequence of furlough, and many other such matters. This principle is applied within the group uniformly, and without discrimination.

Seniority is plainly a proper subject for collective bargaining between an employer and the representative of his employees. See, e.g. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Inland Steel Company* v. *NLRB*, 170 F. 2d 247, *cert. den.* 336 U.S. 960 (1949). The uniform application of the principle of seniority based upon date of hire has been sustained as a fair and reasonable exercise of the duty of a collective bargaining representative. *Grand Lodge* v. *Girard Lodge*, 384 Pa. 248, 120 A.2d 523 (1956).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1962

No. 17,362

SOUTHERN PILOTS ASSOCIATION, LEWIS H. HOLMAN, ET AL., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Intervenor*.

Before: Bazelon, Chief Judge, Prettyman, Senior Circuit Judge, and Wright, Circuit Judge, in Chambers.

Order

On consideration of petitioners' petition for rehearing, it is

ORDERED by the Court that the petition be denied.

Per Curiam.

Dated: July 8 1963

Note: The order contains a stamped notation to the effect that it was filed on July 8, 1963.

APPENDIX B

Federal Register Act

1. Section 8 of the Act (44 U.S.C.A., Section 308):

Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by or under an Act of Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, if said notice shall be published in the Federal Register at such time that the period between the publication and the date fixed in such notice for the hearing or for the termination of the opportunity to be heard shall be (a) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of the Congress; or (b) not less than fifteen days, when no time for publication is specifically prescribed by the Act, without prejudice, however, to the effectiveness of any notice of less than fifteen days where such shorter period is reasonable.

Regulations of Civil Aeronautics Board

1. Part 302 of the Board's Economic Regulations, 17 F.R. 3020, et seq., as amended; 26 F.R. 8054; 27 F.R. 12545:

Section 302.15(a):

(a) Who may intervene. (1) Any person who has a statutory right to be made a party to a proceeding shall be permitted to intervene therein.

(2) Any person whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of the Board's business may be permitted to intervene in any proceeding.

Section 302.15(c):

(c) Petition to intervene. (1) Contents. Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he thinks he should be permitted

to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.

(2) Time for filing. Unless otherwise ordered by the Board, any petition for leave to intervene shall be filed within the following time limits:

(i) In a proceeding where the Board issues a show cause order proposing fair and reasonable mail rates, such petition shall be filed within the time specified for filing notice of objection.

(ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with the Board prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

(iii) A petition to intervene in any Board proceeding filed by a city, or other public body, or a chamber of commerce shall be filed with the Board not later than the last day prior to the beginning of the hearing thereon.

A petition for leave to intervene which is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for his failure to file such petition on time.

(3) Answer. Any party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set forth in paragraph (b) of this section, within seven (7) days after the petition is filed.

(4) Disposition. The decision granting, denying or otherwise ruling on any petition to intervene may be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

Section 302.30(c):

(c) Effect of failure to file timely and adequate exceptions. No objection may be made on brief or at a later time to an ultimate conclusion which is not expressly made the subject of an exception in compliance

with the provisions of this section: *Provided, however*, That any party may file a brief in support of the decision and in opposition to the exceptions filed by any other party.

Section 302.37(a):

(a) Board orders subject to reconsideration; time for filing. Unless an order or a rule of the Board specifically provides otherwise, any party to a proceeding may file a petition for reconsideration, rehearing or reargument of (1) a final order issued by the Board or (2) an interlocutory order issued by the Board which institutes a proceeding or defines the scope and issues of a proceeding or suspends a provision of a tariff on file with the Board. Unless the time is shortened or enlarged by the Board, petitions for reconsideration shall be filed, in the case of a final order, within twenty (20) days after service thereof, and, in the case of an interlocutory order, within ten (10) days after service. However, neither the filing nor the granting of such a petition shall operate as a stay of such final or interlocutory order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. Motions for extension of time to file a petition or answer, and for leave to file a petition or answer after the time for the filing thereof has expired, will not be granted by the Board except on a showing of unusual and exceptional circumstances, constituting good cause for movant's inability to meet the established procedural dates.

Section 302.201:

Any person may make a formal complaint to the Board with respect to anything done or omitted to be done by any person in contravention of any economic regulatory provisions of the act, or any rule, regulation, order, limitation, condition or other requirement established pursuant thereto. Every formal complaint shall conform to the requirements of § 302.3, concerning the form and filing of documents. The submission of a formal complaint by a person other than an Enforcement Attorney (hereinafter called a third party)

shall not in itself result in the institution of a formal economic enforcement proceeding and a hearing with respect to the complaint unless and until the Director of the Bureau of Enforcement dockets a petition for enforcement with respect to such complaint, or a portion thereof, in accordance with § 302.206. * * *.

Section 302.207:

(a) Within fifteen (15) days after the date of service of a petition for enforcement docketed pursuant to § 302.206, the respondent shall file an answer to the complaint attached thereto or incorporated therein unless an answer has already been filed in accordance with § 302.204. Any requests for extension of time for filing of answer to complaint attached to or incorporated in a petition for enforcement shall be filed with the Board in accordance with § 302.17.

(b) All answers shall conform to the requirements of § 302.8(a)-(2) and shall fully and completely advise the parties and the Board as to the nature of the defense and shall admit or deny specifically, and in detail, each allegation of the complaint unless the person complained of is without knowledge, in which case, his answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed to be controverted.

Section 302.209:

The Board (or the Examiner) may, in its discretion, require or permit the filing of a reply in appropriate cases, otherwise no reply shall be filed.

Section 302.210:

The parties to an economic enforcement proceeding shall be the Board (represented by an Enforcement Attorney), the respondent, any person whose formal complaint alleged violations which were later covered by the petition for enforcement, and any other person permitted to intervene pursuant to § 302.15.